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No. 83-2064

Office - Supreme Court, U.S.
FILED
JUL 26 1984
ALEXANDER L. STEVAS,
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

T.H. BELL, SECRETARY OF EDUCATION,
Petitioner,

v.

STATE OF NEW JERSEY

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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BRIEF FOR THE LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW AS *AMICUS CURIAE* IN SUPPORT OF THE PETITION

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BRIEF FOR THE LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW AS *AMICUS CURIAE* IN SUPPORT OF THE PETITION

INTEREST OF *AMICUS CURIAE* *

The Lawyers' Committee for Civil Rights Under Law was organized in 1963 at the request of the President of the United States to involve private attorneys in the national effort to assure civil rights for all Americans. The Committee has, over the past 21 years, enlisted the services of over a thousand members of the private bar in addressing the legal problems of minorities and the poor.

The Lawyers' Committee has had a long-standing interest in Title I of the Elementary and Secondary Edu-

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* Letters of the parties consenting to the filing of this brief have been submitted to the Clerk.

cation Act of 1965 because of the statutory emphasis upon meeting the needs of poor and disadvantaged children.[1] In the early 1970's the Committee began to monitor federal administration of the Title I program, in order to determine whether states and local school districts were using their grants to operate projects which carried out this basic purpose. These activities greatly intensified in 1975 with the creation of the Committee's Federal Education Project. One of the Project's major goals was to stimulate adherence to the categorical restrictions of the Title I statute and regulations in order to increase the effectiveness of local compensatory programs. The Project has been an informational resource for parents of Title I participants and Title I staff in local educational agencies, and it provided legal representation to parents of Title I students in litigation and administrative complaint proceedings, including a major supplanting decision, *Alexander v. Califano*, 432 F. Supp. 1182 (N.D. Cal. 1977).[2]

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[1] In 1981 the Title I program was replaced by "Chapter 1" of the Education Consolidation and Improvement Act of 1981, Pub. L. No. 97-35, §§ 552 *et seq.*, 95 Stat. 464-69 (codified at 20 U.S.C. §§ 3801 *et seq.* (1982)). Chapter 1 retains the Title I focus upon assisting educationally disadvantaged children residing in high-poverty areas, *see* Pub. L. No. 97-35, § 552, 95 Stat. 464 (codified at 20 U.S.C. § 3801 (1982)), as well as the specific targeting and non-supplanting provisions of the Title I law, *see id.*, §§ 556(b)(1), 558(b), 95 Stat. 466, 468 (codified at 20 U.S.C. §§ 3805(b)(1), 3807(b) (1982)). Hence, the rulings below have continuing importance for the major federal program of aid to elementary and secondary schools.

[2] In 1976, pursuant to a contract with the National Institute of Education, the Lawyers' Committee established a separately staffed unit, the Legal Standards Project, to conduct research on the legal framework of Title I. This project subsequently provided extensive recommendations for legislative changes, many of which were incorporated in the Education Amendments of 1978, Pub. L. No. 95-561, 92 Stat. 2143. The Congress' reliance upon the work of the Legal Standards Project is acknowledged in the legislative history of the 1978 amendments.

Throughout its involvement with Title I, the Lawyers' Committee has sought to promote vigorous enforcement of the programmatic and fiscal restrictions embodied in the federal statute and regulations. Compliance with these requirements is essential, in our judgment, to insuring the educational effectiveness of compensatory instruction funded by the federal government, However, our experience demonstrates that meaningful compliance depends, in significant part, upon creating the expectation that failure to meet the statutory conditions upon the expenditure of funds will be followed by audit and recoupment of misspent monies.

Thus, the Committee is concerned that the holding below, applying later-enacted statutory provisions to defeat recoupment of funds which were not expended in accordance with the terms contained in a previous grant-in-aid agreement, will have a detrimental impact upon educational opportunities for poor children by weakening the incentive for meticulous adherence to statutory and regulatory requirements. This is particularly the case here, since funds are not unlimited and accurate targeting of programs to serve only eligible schools and attendance areas is central to the functioning of an effective federal compensatory program. The depth of our concern over these matters led us to submit a brief *amicus curiae* when this matter previously came before this Court on the issue of the Secretary of Education's authority to recover misspent funds. *Bell v. New Jersey*, —— U.S. ——, 76 L. Ed. 2d 312 (1983). Because the ruling by the Third Circuit on remand has an equally devastating potential to impair achievement of basic program goals, and because the Courts of Appeals are being asked with increasing frequency to review final audit determinations of the Department of Education concerning Title I projects, we submit this brief to underscore the important educational, as well as legal, reasons why this Court should again grant review.

REASONS WHY THE WRIT SHOULD BE GRANTED

This case involves the right of the federal government to recover Title I[3] grant monies made available to the State of New Jersey, and by the State to the Newark school district, for the 1970-71 and 1971-72 school years. *New Jersey admits that the funds were expended at ineligible schools rather than in accordance with statutory and regulatory provisions in force when the grants were made.*[4] If the misspent funds are recouped, up to 75% of the amount recovered may be returned to the State for the purpose of supporting additional compensatory programs to assist Newark students who continue to suffer the effects of educational deprivation and disadvantage.[5]

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[3] Title I of the Elementary and Secondary Education Act of 1965, Pub. L. No. 89-10, 79 Stat. 27, *reprinted in* 1965 U.S. Code Cong. & Ad. News 29, as renumbered by Pub. L. No. 89-750, § 116, 80 Stat. 1191, 1198, *reprinted in* 1966 U.S. Code Cong. & Ad. News 1392, 1400.

[4] Pet. App. 45a, 46a (citing Transcript of Oral Argument before Education Appeals Board, June 21, 1979, at 26). Briefly, the statute mandated that Title I-funded projects be located to serve "school attendance areas having high concentrations of children from low-income families." 20 U.S.C. § 241e(a)(1)(A) (1970). Regulations and Program Guides issued by the Department of Health, Education and Welfare between 1965 and 1970 defined this term to mean attendance areas with higher-than-average numbers or percentages of children from poor families. *See generally* Joint Appendix at 14-16, *Bell v. New Jersey*, —— U.S. ——, 76 L. Ed. 2d 312 (1983) (Final Audit Report, New Jersey). The major portion of the audit claim involved in this case results from the improper determination that ten Newark schools met this eligibility standard in the 1971-72 school year.

[5] In the words of the statute, New Jersey would have to spend the returned funds "to the extent possible, for the benefit of the population that was affected by the failure to comply or by the misexpenditures which resulted in the audit exception." *See* 20 U.S.C. § 1234e(a)(2) (1982); Petition for Certiorari, *Secretary of Education v. Kentucky*, No. 83-1798, at 15 n.13.

The Court of Appeals for the Third Circuit rejected recoupment of the monies misspent in 1970-71 and 1971-72 because the challenged expenditures might possibly have been proper if tested according to a school eligibility provision which the Congress added to Title I in 1978.[6] The Court of Appeals reached this result despite the

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[6] Pub. L. No. 95-561, § 101(a), 92 Stat. 2143, 2161-62 (codified at 20 U.S.C. § 2732(a)(1) (1982)). There are two reasons why the expenditures in question might not have been lawful even had they been made after 1978. *First*, as the court below recognized, use of the provision added in 1978 was conditioned upon a special "maintenance of effort" requirement for compensatory programs; since New Jersey had not sought to rely upon the 1978 law prior to review in the Court of Appeals, the record previously made in the administrative proceedings is not adequate to determine whether this condition had been met (*see* Pet. App. 5a). *Second*, the Title I law and regulations always required that projects be of "sufficient size, scope and quality" to offer hope of significant achievement gains for participants. *See* Pub. L. No. 89-10, § 2, 79 Stat. 27, 30, *reprinted in* 1965 U.S. Code Cong. & Ad. News 29, 33 (current version at 20 U.S.C. § 2734(d) (1982). This requirement usually resulted in a school district's establishing Title I projects at fewer than all eligible schools, in light of limited Congressional appropriations, which never reached the authorization level contained in the statute. Because in this case, the federal auditors determined that the number of eligible schools was itself improperly inflated, they had no occasion to consider whether Newark's Title I program during the years in question otherwise met the "size, scope and quality" requirement. Thus, even if the 1978 amendments' 25%-eligibility provision could be used in Newark, questions about the program's conformity with other statutory and regulatory requirements would remain.

Despite this uncertainty, and despite the possibility that the Secretary may still establish, on the remand ordered below, the government's right to recover the funds sought (even under the Third Circuit's retroactive reading of the 1978 amendments), this matter is ripe for review since the decision below finally—and erroneously—determines that issue of retroactivity. Moreover, the decision will bind the Department of Education in Title I audit cases which are now pending and which may in the future arise from the States within the Third Circuit. *Cf.* Pet. at 16 ($68 million in Title I audit claims pending). These facts underline the necessity for review by this Court now.

fact that the 1978 law specifically provides that "the provisions of this Act and the amendments and repeals made by this Act [7] shall take effect October 1, 1978"; [8] and despite the complete absence—from the statutory language and from the legislative history of the 1978 amendments—of any indication that Congress intended the new eligibility standard to have retrospective effect. Instead, the court below relied upon general statements that the 1978 changes were designed to alter restrictive interpretations of the original statutory language and upon the principle that remedial legislation should be applied retroactively.

This view of the federal government's authority to recapture improperly spent grant-in-aid funds would apply not just to education programs but also to a wide variety of other grant statutes which federal Departments are obligated to audit and enforce.[9] For this reason alone, the case involves "a public matter of great national concern" [10] which should be reviewed by this Court.[11]

Furthermore, the approach taken by the Third Circuit rests upon fundamental legal errors which demand cor-

[7] New Jersey does not contend, and the court below did not hold, that the 1978 amendments explicitly repealed or retrospectively amended the previous eligibility standards which the auditors found to have been violated.

[8] Pub. L. No. 95-561, § 1530, 92 Stat. 2143, 2380, *reprinted in* 1978 U.S. Code Cong. & Ad. News 2143, 2380.

[9] *Cf.* 5 U.S.C. App. (1982) (Inspector General Act of 1978).

[10] Pet. App. 5a [Court of Appeals' ruling].

[11] Similarly, the Sixth Circuit's decision in *Kentucky Department of Education v. Secretary*, 717 F.2d 943 (1983), *petition for cert. filed*, 52 U.S.L.W. 3845 (May 3, 1984), adopts a rule of construction which will have serious consequences for all grant programs, and especially for compensatory education efforts under Title I or Chapter 1. *See infra* note 25. We submit that review should be granted in both matters and argument in tandem scheduled.

rection by this Court. As the government persuasively demonstrates, the Court of Appeals confused two basic and well-settled rules of statutory construction that, absent clear legislative intent to the contrary, govern retroactivity: (1) substantive legislation applies only prospectively; [12] and (2) remedial or procedural enactments are given retrospective application in suits filed prior to, but still pending after, their passage unless substantive rights would thereby be affected or injustice would result.[13] *See* Pet. at 8-15. Moreover, the ruling below violates simple principles of contract which apply to grant-in-aid programs. As this Court recognized only last Term in its prior decision in this case, New Jersey "chose to participate in the Title I program and, as a condition of receiving the grant, freely gave its assurances that it would abide by the conditions of Title I.[14] . . . [If] the State failed to fulfill those assurances, . . . it therefore became liable for the funds misused, as the grant specified . . . funds that it accepted under admittedly valid conditions with which it failed to comply." *Bell v. New Jersey*, 76 L.Ed 2d at 326-27; *see also, id.* at 329 (White, J., concurring).[15]

The government's right to recover funds not expended in accordance with the specified conditions is thus a contract right, and subsequent legislation is relevant only insofar as it unambiguously represents a waiver of the

[12] *E.g., United States v. Security Industrial Bank*, 459 U.S. 70, 79 (1982).

[13] *E.g., Bell v. New Jersey*, —— U.S. ——, 76 L. Ed. 2d 312, 318 n.3 (1983); *Bradley v. School Board of Richmond*, 416 U.S. 696, 711 (1974). Actually, the Court of Appeals discussed only this second principle, while ignoring the first.

[14] *See* Pet. App. 40a.

[15] *Cf. Heckler v. Community Health Services of Crawford County, Inc.*, 52 U.S.L.W. 4621 (U.S. May 21, 1984).

contractual conditions.[16] For example, enactment of a bill directing the Secretary of Education not to seek to recover misexpenditures identified in audits completed prior to a specified date would have constituted a waiver.[17] Similarly, the 5-year "statute of limitations" on repayment of misexpenditures of Title I funds[18] is such a waiver under the circumstances specified in the statute. Absent such a waiver, there is no basis for modifying the contractual understanding between the parties by virtue of a subsequent enactment applying to future grants. This amounts to rewriting the contract to the detriment of the Department of Education and

[16] As the government's petition demonstrates, nothing in the language or the legislative history of the 1978 amendments to Title I indicates Congress' intent to waive federal rights under the earlier grant agreements. *See* Pet. at 9-11. This Court has repeatedly emphasized that repeals by implication are not favored. *E.g., Kremer v. Chemical Construction Company*, 456 U.S. 461, 468-78 (1982).

[17] Such measures were considered by the Congress in 1980 and 1981. A subcommittee of the House of Representatives held hearings on one bill, *Dismissing Certain Cases Pending Before the Education Appeal Board: Hearings on H.R. 8145 Before the Subcommittee on Elementary, Secondary and Vocational Education of the House Comm. on Educ. & Labor*, 96th Cong., 2d Sess. (1980), but it was never reported out. A floor amendment with the same effect was defeated in the Senate on a point of order. 127 Cong. Rec. S5427-30, 5442 (daily ed., May 21, 1981).

[18] 20 U.S.C. § 884 (Supp. IV 1974), as added by Pub. L. No. 93-380, § 106, 88 Stat. 484, 512, *reprinted in* 1974 U.S. Code Cong. & Ad. News 541, 576, provided that:

> No state or local educational agency shall be liable to refund any payment made to such agency under this Act (including Title I of this Act) which was subsequently determined to be unauthorized by law, if such payment was made more than five years before such agency received final written notice that such payment was unauthorized.

See also H.R. Rep. No. 805, 93rd Cong., 2d Sess., *reprinted in* 1974 U.S. Code Cong. & Ad. News 4093, 4160. The currently applicable version of this provision is codified at 20 U.S.C. § 1234a(g) (1982).

that of the program beneficiaries, who relied on the assurances which New Jersey submitted to expend Title I funds only in accordance with the statutory and regulatory criteria.

This Court has held that the States can be deemed accountable to comply with only those federal funding conditions which were clearly explicated at the time a grant was accepted. *Pennhurst State School & Hospital v. Halderman*, 451 U.S. 1 (1981). The corollary of this principle is that, where the terms of the agreement were clear and the fact of their violation is admitted, as in this case, the States can and should be held accountable to make repayments.

Review in this case is particularly warranted because the substantive requirement at issue—the determination of school and attendance area eligibility—is of central importance to the integrity and effectiveness of federal compensatory education programs,[19] which constitute the largest part of federal aid to elementary and secondary education. While it would be highly desirable to assist all children in need of services, limited funding has made this impossible. Expenditures must be targeted on discrete populations. Hence, the statute provides that appropriations are to be allocated among States and school districts according to the number of children from low-income families,[20] and that funds are granted only for programs which contribute to meeting the needs of educationally deprived children *in areas within school districts where there are large concentrations of children from such families.*[21]

[19] This remains true under Chapter 1, as it was under Title I. *See supra* note 1.

[20] *See* 20 U.S.C. § 241c(2) (Supp. IV 1968) [Title I]; 20 U.S.C. § 2711(c) (1982) [same]; 20 U.S.C. § 3803 (1982) [Chapter 1].

[21] 20 U.S.C. § 2732 (1982) [Title I]; 20 U.S.C. § 3805(b)(1)(A) (1982) [Chapter 1]. *See Alexander v. Califano*, 432 F. Supp. 1182,

The project area eligibility standards are linked to the additional requirement, which has been maintained throughout all versions of the statute since it was first passed in 1965, that programs must be "of sufficient size, scope and quality to give reasonable promise of substantial progress toward meeting" "the special educational needs of educationally deprived children in" project areas.[22] The purpose of this provision is to avoid dissipation of federal grants by spreading them among too many underfunded projects in too many different schools. Because local school administrators are almost always under intense pressure to serve as many students as possible,[23] the threshold determination of eligible school attendance areas facilitates compliance with the "size, scope and quality" requirement.[24] It is, for this reason,

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1189 (N.D. Cal. 1977) (referring to "the legislative choice to concentrate rather than spread aid among educationally deprived children"). Once eligible project areas are selected, every child determined to be educationally deprived, regardless of economic status, is eligible to receive services. Educational deprivation is the sole criterion for deciding which children in a project area will participate in these federal programs.

[22] Pub. L. No. 89-10, § 205(a)(1), 79 Stat. 27, 30, *reprinted in* 1965 U.S. Code Cong. & Ad. News 29, 33 (codified at 20 U.S.C. § 241e(a)(1) (Supp. IV 1968)) [Title I]; *see* 20 U.S.C. § 3805(b)(3) (1982) [Chapter 1].

[23] *See* Joint Appendix at 176, *Bell v. New Jersey* (New Jersey Department of Education's Application for Review of Final Audit Determination) ("LEA had no choice but to assume high concentrations of low-income families in all attendance areas and to attempt to spread the benefits of Title I as broadly as possible to assure that most educationally deprived children would be served").

[24] *See id.* at 34 (Final Audit Report, New Jersey) ("We do not question SDE's assertion that during the period covered by our audit poverty was widespread in the district. This incidence of poverty therefore necessitated closer attention to the calculation of low-income percentages to insure use of Title I funds in eligible low-income attendance areas with the greatest concentrations of educationally disadvantaged children.")

critical to the operation of successful compensatory programs.[25]

New Jersey's approval of the Newark school district's application to provide programs at ten eligible schools thus was no mere technical violation. Rather, it diluted the funds, and thereby the programs, available to participating students. The audit and recoupment process allows the federal government to seek to rectify this error, and the 75%-payback provision, *see supra* note 5 and accompanying text, provides a mechanism for using the process to aid the Title I students harmed by the misexpenditures. From an educational standpoint, therefore, it is a matter of great significance whether the process will go forward or whether New Jersey will be permitted to escape any obligation either to repay the funds or to increase its remedial efforts. Since there is

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[25] Similarly, the "supplanting" violation at issue in *Secretary of Education v. Kentucky*, *supra* note 5, involves another of the most fundamental aspects of federal compensatory efforts: the provision of extra resources for the education of participating children, above and beyond what they would otherwise receive from state and local sources. In that case, in 1974, fifty school districts in Kentucky used Title I funds to support entirely separate "readiness" classes for participating children, who were removed from their regular first- or second-grade classes. Even though these students were promoted at the end of the year to the next grade, they did not receive the benefit of any expenditure of state and local funds for their education in required subjects such as language arts, mathematics, etc. The Secretary of Education sustained audit findings that this arrangement constituted "supplanting" in violation of the requirement of the law that "Federal funds . . . will be so used (i) as to supplement and, to the extent practical, increase the level of funds that would, in the absence of such Federal funds, be made available from non-Federal sources for the education of pupils participating [in the Federal program]." Although Kentucky argued that it had not reduced the number of teachers or level of expenditures in schools which had Title I readiness classes, this merely compounded the supplanting—since a small number of nonparticipating students received the increased benefits of that State and local funding, while Title I students received none.

no persuasive indication that Congress intended, by its subsequent change in the law, to alter that obligation, the decision below makes not only bad law but also bad educational policy.

As this Court is well aware, the statutory framework of federal grant programs rarely remains completely unchanged; rather, successive Congresses often amend and re-amend an enactment in the light of experience and perceptions. Indeed, State and local grantees are among the most fervent supporters of this "fine tuning."[26] For this reason, if the decision below is permitted to stand, federal grantees subject to audit exceptions can be expected to seek repeated statutory changes that would make their past non-compliance with program requirements conform to the law. The incentive to maintain compliance with statutory and regulatory provisions will be substantially diminished; federal program beneficiaries—in this case, educationally disadvantaged children who most need assistance—will be the losers. Rather than permit such a result, this Court should review this

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[26] *See, e.g., Oversight Hearing on Amendments to Title I of ESEA and GEPA: Hearings Before the Subcommittee on Elementary, Secondary and Vocational Education, House Comm. on Educ. & Labor*, 96th Cong., 1st Sess. 26-32 (1979) (testimony of New York City Chancellor Macchiarola supporting amendment to drop matching funds requirement for schoolwide projects); *Education Amendments of 1977: Hearings on S. 1753 Before the Subcommittee on Education, Arts and Humanities of the Senate Comm. on Human Resources*, 95th Cong., 1st Sess. 1554-58 (1977) (statement of Conrad Ott, Superintendent of Akron public schools, requesting amendment to permit continuing services to students formerly attending Title I-eligible schools which were closed); *id.* at 1397-99 (statement of Pennsylvania Secretary of Education Caryl M. Kline, proposing modification of supplanting provision); *Elementary and Secondary Education Amendments of 1973: Hearings on H.R. 16, H.R. 69, H.R. 5163, and H.R. 5823 Before the General Subcommittee on Education, House Comm. on Educ. & Labor*, 93rd Cong., 1st Sess. 419 (1973) (testimony of Chicago Assistant Superintendent James Moffat, seeking elimination of annual school eligibility requirement).

case and hold grantees to repayment in the absence of clear legislative direction to the contrary.

Based upon nearly a decade of experience with the Title I and Chapter 1 programs, including extensive interchange with State and local school personnel and litigation involving Title I claims, the Lawyers' Committee is convinced that the audit process does not impose unjustified burdens upon school officials based upon technical or complex statutory or regulatory requirements. In this case, for example, the Newark school system apparently had little difficulty in correctly identifying eligible schools in the school year following those for which the auditors noted misexpenditures.[27] Throughout the history of Title I, most States and school districts have not only conformed their programs to the legal requirements, but many have also repaid audit exceptions when mistakes were identified.[28] Thus, the result reached below is unfair, both to States which have not violated program restrictions and also to States which made errors, recognized their accountability, and voluntarily paid their debts. It is also unfair to the interests of Newark's Title I children, which will be doubly impaired: once when funds were diverted from those the program was intended to help, and again when these funds are not recovered. The rights of these program beneficiaries should be vindicated by repayment of the misspent funds, especially since, under the 75% payback provision, most of this money can then be directed to those for whom it was originally intended—educationally deprived children.

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[27] *See* Joint Appendix at 26, *Bell v. New Jersey* (Final Audit Report, New Jersey).

[28] *See, e.g., Dismissing Certain Cases Pending Before the Education Appeals Board: Hearings on H.R. 8145 Before the Subcommittee on Elementary, Secondary and Vocational Education of the House Comm. on Education & Labor*, 96th Cong., 2d Sess. 392 (1980) (Prepared Statement of Hayes Mizell, Chairman, National Advisory Council on the Education of Disadvantaged Children).

CONCLUSION

For the foregoing reasons, *amicus* urges that the Petition for Certiorari be granted.[29]

Respectfully submitted,

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[29] As previously noted, we also urge the Court to grant review in the similar case of *Secretary of Education v. Kentucky* because the ruling in that case, too, both involves a critical element of federal education programs and also improperly limits the recoupment authority of the Secretary of Education. *See supra* notes 11, 25.